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SEP 29 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
International Settlement Rates	)	File No. IB 96-261

PETITION FOR PARTIAL RECONSIDERATION

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Dated: September 29, 1997

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SUMMARY

AT&T strongly endorses the Commission's establishment and enforcement of the new benchmark settlement rates, which will reduce the exorbitant rates that presently cause high prices for U.S. and foreign consumers, restrict market growth, and provide a large and growing windfall to foreign carriers that allows them to cause competitive harm to U.S. carriers and consumers.

In this Petition, AT&T seeks reconsideration only of the Section 214 authorization conditions that are adopted by the *Benchmark Order* to address potential distortions in the U.S. market for IMTS resulting from above-cost settlement rates. While fully supporting the use of settlement rate conditions to prevent potential market distortions, AT&T respectfully requests the Commission to reconsider its decision to condition Section 214 authorizations on adherence to benchmark settlement rates. Requiring adherence to the lower "best practice" rate would largely remove the incentive and ability to make anticompetitive use of above-cost settlement rates.

AT&T also asks the Commission to revise the average variable cost "bright line" test for outbound facilities-based distortion to include all variable or incremental costs attributable to the relevant service. The narrow definition of variable costs adopted by the *Benchmark Order* would allow prices to be reduced far below both the levels the Commission has previously determined to be predatory and those required by antitrust precedent.

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PETITION FOR PARTIAL RECONSIDERATION

AT&T Corp. ("AT&T"), in accordance with Section 1.106 of the Commission's Rules, hereby submits this Petition for Partial Reconsideration in the above-referenced matter. In the *Benchmark Order*,[1] the Commission established benchmarks to govern the international settlement rates that U.S. carriers may pay foreign carriers to terminate international traffic originating in the United States.

The new benchmarks will reduce the exorbitant settlement rates that presently cause high prices for U.S. and foreign consumers, restrict market growth, and provide a large and growing windfall to foreign carriers that allows them to cause competitive harm to U.S. carriers and consumers. AT&T strongly endorses the Commission's establishment and enforcement of the new benchmark rates, which are amply supported by its authority under the Communications Act, relevant caselaw and international regulations.

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1 *International Settlement Rates*, IB Docket No. 96-261, Report and Order, (released Aug. 18, 1997), FCC 97-280 ("*Benchmark Order*").

The *Benchmark Order* also adopted conditions for certain types of Section 214 authorizations to address potential distortions in the U.S. market for IMTS resulting from above-cost settlement rates. In this Petition, AT&T seeks reconsideration only of these U.S. market entry conditions.

Under these conditions, authorizations to provide international facilities-based services from the U.S. to affiliated markets will be dependent upon the U.S. carrier's foreign affiliate offering a settlement rate at or below the relevant benchmark rate. Additionally, if market distortion occurs, the Commission will take enforcement action, which may include requiring that the settlement rate be reduced to a "best practice rate" or the revocation of the relevant authorization.

Similarly, applications to provide switched services over facilities-based or resold international private lines will be granted on the condition that at least half of the traffic on the route in question is subject to a settlement rate at or below the relevant benchmark. The Commission will likewise take enforcement action in the event of market distortion, which may include requiring that at least half the traffic on the route be subject to a "best practice" settlement rate or the revocation of authorizations.

While fully supporting the use of settlement rate conditions to prevent potential market distortions, AT&T respectfully requests the Commission to reconsider its decision to condition Section 214 authorizations on adherence to benchmark settlement rates. Requiring adherence to the lower "best practice" rate would largely remove the incentive and ability to make anticompetitive use of above-cost settlement rates. AT&T also requests the Commission to revise the average variable cost "bright line" test for outbound facilities-based distortion to include all variable or incremental costs attributable to the relevant service.

I. MARKET ENTRY SHOULD BE CONDITIONED ON THE ADOPTION OF "BEST PRACTICE" RATHER THAN BENCHMARK RATES.

AT&T strongly shares the Commission's concern to prevent competitive distortion resulting from above-cost accounting rates where facilities-based services are provided to affiliated markets and on routes where switched services are provided over international private lines. AT&T also supports the Commission's decision to address these potential harms to competition by conditioning Section 214 authorizations on reductions in settlement rates. However, AT&T urges the Commission to reconsider its decision to require settlement rates to be set only at or below the relevant upper-end benchmark level, rather than to require rates to be reduced to the "best practice" rate that marks the low-end of the benchmark ranges.

1. The Commission Properly Recognizes That Carriers With Above-Cost Settlement Rates May Engage in Price Squeezes and Raise Competitors' Costs Through One-Way By-Pass.

The *Benchmark Order* emphasizes that above-cost settlement rates may cause competitive harm where outbound facilities-based services are provided to affiliated markets or where switched services are provided over international private lines. Regarding outbound facilities-based services, the Commission "conclude[s] that a U.S.-licensed carrier does have the *ability* to engage in price squeezes that create distortions in the U.S. market for IMTS where it provides facilities-based service to a market in which its affiliated foreign carrier provides the terminating service and collects above-cost settlement rates."[2] Such carriers have "the ability and incentive" to reduce IMTS prices in order to "generate additional [settlements] revenue for the foreign carrier by stimulating additional U.S.-outbound traffic to its home market from all carriers."[3]

The *Benchmark Order* also finds that "where the U.S. affiliate sets its prices below its own costs of providing service, the lower prices may be the result of a predatory price squeeze and distort competition."[4] Thus, as a preventive measure to "substantially reduce[] the above-cost termination charges that may be used to execute a price squeeze," the Commission will require settlement rates to be at benchmark levels before facilities-based service may be provided to an affiliated market.[5]

The Commission adopts a similar condition to prevent the provision of switched services over international private lines from resulting in one-way by-pass activities that would "exacerbate[] the U.S. net settlements deficit and ultimately increase the burden on U.S. ratepayers through higher rates for IMTS."[6] It concludes that requiring settlement rates for at least 50 percent on the route to be at or below the benchmark rate before international private lines may be used to carry U.S. switched traffic will "substantially reduce[] the incentive to engage in one-way by-pass."[7]

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2 *Id.*, at ¶ 208 (emphasis in original).

3 *Id.*, at ¶ 211.

4 *Id.*

5 *Id.*, at ¶ 222.

6 *Id.*, at ¶ 242.

7 *Id.*, at ¶ 248.

Although the Commission correctly identifies the need for these settlement rate conditions, it should reconsider its decision not to further and require settlement rates to be at the "best practice" rate that marks the low-end of the benchmark range where outbound facilities-based services are provided to affiliated markets or where switched services are provided over international private lines. Because this lower rate is much closer to foreign market termination costs, it would largely remove the ability and incentive to use settlement rates to engage in price squeezes and one-way by-pass.

2. A Fully Preventive Approach Should be Preferred to Reliance Upon *Ex Post* Enforcement.

The Commission concedes that upper-end benchmark conditions do not "completely eliminate" either the ability of foreign-affiliated carriers to execute price-squeezes or the incentives to engage in one-way by-pass,[8] but reasons that conditioning authorizations on the adoption of a settlement rate at the low-end of the benchmark ranges would deter entry and be unnecessary to prevent distortion because of the ability to take enforcement action against harmful conduct.[9] Neither of these considerations justifies the Commission's failure to adopt an entry condition resolving this critical issue.

Under the Commission's approach, protection of the U.S. market against the potential competitive harm that the Commission acknowledges may still occur from above-cost settlement rates, even at benchmark levels, thus rests upon the effectiveness of

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[8] *Id.*, at ¶ ¶ 222, 248.

[9] *Id.*, at ¶ ¶ 221, 247-48.

enforcement action. Yet, because of the difficulties in detection,[10] delays, and additional costs entailed in any *ex post* remedial approach, reliance upon enforcement action is inherently less effective than preventive measures in ensuring that above-cost settlement rates are not used for anticompetitive purposes. Indeed, the Commission recognizes as much in adopting the benchmark condition because "the consequences of carriers opting to engage in [a price squeeze strategy] are serious enough for us to take the preventive measure of adopting a Section 214 authorization condition."[11]

Such anticompetitive conduct would occur at a time of widespread potential new competitive entry in both U.S. and foreign markets after the WTO Agreement on Basic Telecommunications becomes effective on January 1, 1998. At this critical juncture, carriers with above-cost settlement rates will have strong incentives to engage in price squeezes and one way by-pass in order to raise the costs of the unaffiliated U.S. carriers who are their actual and potential rivals in both U.S. and foreign markets.[12] Further, below cost prices -- such as those that would result from price squeezes --

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10 For example, application of the bright line test for outbound facilities-based distortion will be complicated by non-recurring charges, non-linear tariffs, volume discounts, rebates and other tariff complexities, as well as the fact that services are frequently sold under contract rather than tariffs.

11 *Id.*, at ¶ 218.

12 *See* Attachment to Letter dated July 10, 1997 from James Talbot, AT&T to Mr. William Caton, Acting Secretary, FCC (*Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, File No. IB 97-142, Comments of AT&T, dated July 9, 1997), at 25-26, 35.

themselves "can distort decision-making by potential competitors concerning entry and investment."[13] In such circumstances, a fully preventive approach should be preferred.

The Commission should not be dissuaded from this approach by concerns that a requirement that settlement rates be reduced to the low-end of the benchmark ranges would constitute an entry deterrent. As the *Benchmark Order* affirms, reasonable Section 214 authorization conditions to protect competition that are applied uniformly to all carriers providing service in the United States are consistent with WTO requirements.[14] Rather than imposing asymmetric costs on different carriers, such conditions merely remove the asymmetric subsidies that provide the ability and incentive for carriers receiving above-cost settlement rates to raise their rivals' costs and to lower prices to predatory levels. Further, unlike the "illusory" gain to consumers from subsidized competition, "[r]educing settlements to costs . . . would result in a real gain to consumers and would improve rather than harm the competitive process in the U.S."[15]

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13 *Price Cap Performance Review for Local Exchange Carriers*, 11 FCC Rcd. 858, 872 (1995) (Second Further Notice of Proposed Rulemaking).

14 *Benchmark Order*, at ¶ 264. *See also, Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, File No. IB 97-142, Reply Comments of AT&T (filed Aug. 12, 1997), at 29-30.

15 Attachment to Letter dated July 10, 1997 from James Talbot, AT&T to Mr. William Caton, Acting Secretary, FCC (*Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, File No. IB 97-142, Comments of AT&T, dated July 9, 1997), at 26, *quoting Id.*, at Attachment 3, Affidavit of Dr. William H. Lehr, at 15-16.

II. THE COMMISSION SHOULD REVISE THE MARKET DISTORTION TEST FOR OUTBOUND FACILITIES-BASED SERVICES.

The Commission establishes a rebuttable presumption that price squeeze behavior has occurred if a carrier's U.S. prices are below average variable costs on the route. This "bright line test" will play an especially critical role in protecting U.S. competition under the approach taken by the *Benchmark Order* of conditioning such authorizations on the adoption of upper-end benchmark rates that, as the *Order* acknowledges, do not eliminate the possibility that price squeezes may still occur.

The Commission should, however, revise the costs recognized by the *Benchmark Order* for these purposes. Limiting these costs to the net settlement rate and any originating access charges is not supported by Commission or antitrust precedent and would encourage carriers with above-cost settlement rates to price at predatory levels that would inflict significant losses on their rivals.

1. The Average Variable Cost Bright Line Test Should Include All Variable or Incremental Costs Attributable to the Relevant Service.

The *Benchmark Order* establishes a "rebuttable presumption" concerning the existence of "price squeeze behavior that creates distortions in the U.S. market for IMTS" if "any of a carrier's tariffed collection rates on an affiliated route are less than the carrier's average variable costs on the route."[16] However, the *Order* defines the costs that may be considered for the purpose of the bright line market distortion test as comprising

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16 *Benchmark Order, at* ¶ 224.

only "the carrier's net settlement rate plus any originating access charges."[17] The *Order* declines to take account of other costs on the grounds that "[m]ost" such expenses are "fixed in the short-term and would be incurred regardless of whether the carrier provided service."[18]

AT&T urges the Commission to reconsider this unsupported conclusion, which would allow prices to be reduced far below the costs that should be considered for this purpose. There is no basis for ignoring such variable costs as billing and collection, marketing, and customer service. Prior Commission orders also make clear that all variable costs attributable to the relevant service should be considered to determine whether a price is predatory.

In its recent ruling in the *PanAmSat* predatory pricing case, the Commission noted that "[f]or the purpose of determining predatory pricing, the Commission has defined 'cost' as 'average variable cost.'"[19] However, it further observed that "[v]ariable costs include, inter alia, cost increments in plant investment as well as network maintenance and network and customer operations attributable to the new

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17 *Id.*, at ¶ 224.

18 *Id.*

19 *PanAmSat Corp. v. Comsat Corp.*, File No. E-96-21, Memorandum Opinion and Order, (released May 20, 1997), ¶ 17, 1997 LEXIS 2657, *11.

service."[20] AT&T interprets this definition of average variable cost to be equivalent to the total service long-run incremental cost standard, or average incremental cost.[21]

In *GTE Telephone Operating Companies Investigation of Below-band Transport Rate*,[22] the Commission similarly noted that past average variable cost showings have included "for the service in question, the unit costs of plant investment, network maintenance and operations, and customer operations." Plant investment costs "would include 'capital costs,' i.e., depreciation expense, net return, and relevant taxes."[23]

Courts in antitrust price squeeze cases require downstream prices to be well above the level established by the Commission's bright line test.[24] In *United States v. Aluminum Co. of America*,[25] Judge Learned Hand held a price squeeze to violate Section 2 of the Sherman Act where an equally efficient competitor could not match the price and still earn a "living profit." The European Union has recently proposed a similar test to prevent price squeezes by dominant access providers that would require a reasonable efficient service provider in the downstream market to be able to earn "a normal profit."[26]

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20 *Id.*

21 *See* William J. Baumol, *Superfairness,* MIT Press (1986), at 116 n.4 (average variable cost is equivalent to average incremental cost).

22 10 FCC Rcd. 1573, 1575 (1994) (Memorandum Opinion and Order).

23 *Id.*

24 *See Access Charge Reform*, CC Docket No. 96-262, First Report and Order, (released May 16, 1997), FCC 97-158, ¶ 282, n. 376 (citing cases).

25 148 F.2d 416, 437-38 (2d Cir. 1945).

26 *See Communication from the Commission on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector - Framework,*

(footnote continued on following page)

Other U.S. courts have applied different tests for anticompetitive price squeezes, examining whether the vertically integrated provider's wholesale price is greater than its retail price, thus making it impossible for competitors to earn a profit,[27] applying a transfer price test to determine whether the vertically integrated could have made a profit by selling at its own retail rates if it had purchased at its own wholesale rates,[28] or using a rate of return test to determine whether the vertically integrated company's wholesale profit margin significantly exceeds its retail profit margin.[29]

(footnote continued from previous page)

Relevant Markets and Principles, Official Journal of the European Communities (C 76/9), Mar. 3, 1997, at ¶ 92 (downstream market price "must be large enough to allow a reasonably efficient service provider in the downstream market to obtain a normal profit unless the dominant company can show that its downstream operation is exceptionally efficient").

27 *See, e.g., Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F. 2d 802, 808-09 (3d Cir. 1984), *cert. denied*, 477 U.S. 908 (1986).

28 *See, e.g., Illinois Cities of Bethany v. FERC*, 670 F.2d 187, 198-99 (D.C. Cir. 1981);*Ray v. Indiana & Mich. Elec. Co.*, 606 F. Supp. 757, 776 (N.D. Ind. 1984).

29 *Id.* (*citing City of Batavia v. FERC*, 672 F.2d 64, 90 (D.C. Cir. 1982).

The narrow definition of variable costs adopted by the *Benchmark Order* for the purposes of the bright line test would thus allow prices to be reduced far below both the levels that the Commission has previously determined to be predatory and those required by antitrust precedent. Consequently, it would not prevent carriers with above-cost settlement rates (even at benchmark levels) from inflicting losses on their U.S. competitors in order to weaken their ability to compete in U.S. and global markets. Although competitors could still challenge such rates by filing complaints with the Commission and by bringing antitrust actions, this would not provide any easy or timely remedy to the continued price squeeze dangers identified by the *Benchmark Order*, particularly at a time of potentially widespread U.S. market entry following the WTO Agreement.

The Commission should accordingly revise the elements of the bright line test for market distortion set forth in the *Benchmark Order*. It should not be limited to the net settlement rate and originating access charges, but should include all variable or incremental costs that would not be incurred if the service were not offered.

CONCLUSION

For the reasons stated herein, AT&T respectfully urges the Commission to reconsider its decision to condition Section 214 authorizations on adherence to benchmark settlement rates and instead to require adherence to the "best practice" rate. AT&T also requests the Commission to revise the average variable cost "bright line" test for outbound facilities-based distortion to include all variable or incremental costs attributable to the relevant service

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Helen Elia, do hereby certify that on this 29th day of September, 1997, a copy of the foregoing "Petition for Partial Reconsideration" was mailed by U.S. first class mail, postage prepaid, upon the parties on the attached service list:

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